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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. A-550

RONALD A. LEE,
Petitioner,

VERSUS

STATE OF OKLAHOMA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

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In the
Supreme Court of the United States
OCTOBER TERM, 1973

No. A-550

RONALD A. LEE,
Petitioner,

VERSUS

STATE OF OKLAHOMA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

Petitioner prays that a Writ of Certiorari issue to review the Judgment herein of the Court of Criminal Appeals for the State of Oklahoma entered in two cases with the above entitled caption, consolidated herein due to the similarity of issues and parties involved. Final Judgments were issued in these companion cases on the 22nd day of August, 1973, and the 20th day of September, 1973, respectively.

CITATION TO OPINION BELOW

The opinions of the Court of Criminal Appeals are not yet reported and are printed in the Appendix, *infra*.

JURISDICTION

The judgment of the Court of Criminal Appeals for the State of Oklahoma became final in Case No. 18091 on the 22nd day of August, 1973, and in Case No. 18092 on the 20th day of September, 1973. The jurisdiction of the Court has been invoked under 28 U.S.C., §1257(3). All issues presented herein were raised below as indicated by the opinions in the Appendix and Mr. Stephen Jones is a member in good standing licensed to practice before this Honorable Court.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ."

United States Constitution, Amendment XIV:

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

STATUTORY PROVISION INVOLVED

"Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000.00 or imprisoned not more than two years, or both." 18 U.S.C., §1385.

QUESTIONS PRESENTED

(1) Should evidence seized by one in violation of Title 18 U.S.C. §1385 be admissible in Court against the Defendant, where both investigative officers knew, or should have known their concerted activity was, in fact, in violation of the laws of the United States?

(2) Did the trial court err in failing to quash an improperly impaneled jury? (Whether systematic exclusion of a definable class of persons from a State District Court jury panel is in derogation of the United States Constitution?)

STATEMENT OF THE CASE

Your Petitioner, RONALD A. LEE, was convicted on the 29th day of August, 1972, in the District Court of Comanche County, State of Oklahoma, for the offense of Illegal Delivery of Marijuana, and on the 7th day of September, 1972, he was sentenced to seven (7) years' imprisonment and fined Four Thousand Dollars ($4,000.00). On August 3, 1973, the Court of Criminal Appeals for the State of Oklahoma affirmed the Petitioner's conviction by a two-to-one vote, and on August 22, 1973, Petitioner's

Petition for Rehearing was denied, rendering the State Court determination final (Appendix, *infra,* pp. iii-vi; p. i, respectively).

RONALD A. LEE was further convicted on September 6, 1972, in the District Court of Comanche County, State of Oklahoma, for the offense of Unlawful Delivery of Marijuana, and on September 7, 1972, he was sentenced to five (5) years' imprisonment. On September 6, 1973, the Court of Criminal Appeals affirmed Petitioner's conviction by a two-to-one vote on the same grounds as the case aforementioned and Petitioner's Petition for Rehearing was likewise denied therein with the case thus becoming final (Appendix, *infra,* pp. vi-viii; p. ii, respectively).

Although the facts involved in these two cases are in essence identical, they will be handled separately in the Statement of the Case.

In the first of these cases, the State's evidence revealed that on May 5, 1972, at approximately 8:00 p.m., Larry Hugh Smith, Provost Marshal's Investigator for the CID office, Fort Sill Military Reservation, met with Sergeant Ronald Rutledge of the Lawton Police Department and was given Twenty-Six Dollars ($26.00) by Sergeant Rutledge, in City funds, and was instructed to go to the Defendant's mobile home to purchase some drugs. After receiving the $26.00, Smith proceeded to the Defendant's mobile home, where he purchased a plastic bag containing what was later found to be marijuana, for the price of $12.00.

The Defendant and his wife both testified that they had not seen Smith at any time on the 5th day of May,

1972, nor had Smith purchased any marijuana from the Defendant on that day.

The second case in time under the above caption alleges facts very similar to those aforementioned. They are:

That on April 29, 1972, at approximately 9:00 p.m., Larry Hugh Smith, Provost Marshal Investigator for the CID office, Fort Sill Military Reservation, met with Detective Glen Williams of the Lawton Police Department and was given Eighteen Dollars ($18.00) in City Funds, by Detective Williams and was instructed to go to the Defendant's mobile home to purchase some drugs. After receiving the $18.00, Smith proceeded to the Defendant's trailer where he asked the Defendant if he had any marijuana that he wanted to sell and the Defendant replied that he did, and that he was selling it for Twelve Dollars ($12.00) a "lid." Smith then purchased one "lid" of marijuana from the Defendant, paying him $12.00. Smith then returned with the "lid" to the south end of the trailer court where he met with Officer Williams, who placed the substance in an envelope and sealed and initialed it. The Defendant stipulated that if the chemist for the Oklahoma State Bureau of Investigation were called as a witness, he would testify that on the 1st day of May, 1972, he received a package from the Lawton Police Department, which contained a plastic baggie of green, leafy substance with the initials "L.H.S." and "G.W." on the plastic baggie; that he analyzed the substance and found it to be marijuana.

The Defendant's wife and sister both testified that the facts as related by Smith in relation to the purchase of marijuana from the Defendant on April 29, 1972, were un-

true and that they were both at the Defendant's house on this date.

Hereinafter, these two consolidated cases will be discussed as one unless reference is made to Sergeant Ronald Rutledge, or Detective Glen Williams, due to the fact that the major differentiation in the two cases is simply that a different police officer was involved in each. The District Court concluded that the concerted activity between the Lawton Police Department and the United States Army, although in violation of the laws of the United States of America, did not render as inadmissible the evidence seized through such illegal activity. The District Court likewise concluded that the procedures followed in impaneling the juries involved herein were in conformance to the statutes of the State of Oklahoma and that those statutes were not repugnant to the United States Constitution. The Court of Criminal Appeals for the State of Oklahoma agreed with the aforementioned conclusions and affirmed Petitioner's convictions. These two opinions are included in the Appendix submitted, Case No. 18091 at page 2a and 18092 at page 4a, respectively.

The questions presented in the Petition were raised prior to trial in the State Court by way of Motion to Quash the Jury Panel and by way of Motion to Suppress Illegally Seized Evidence. These two issues were ruled on by the District Court as well as the Court of Criminal Appeals and the determination appears in the Appendix attached hereto.

Mr. Stephen Jones, attorney for Petitioner, is a member of the Bar of the State of Oklahoma and licensed to practice before this Honorable Court.

REASONS FOR GRANTING THE WRIT

I.

THE QUESTION WHETHER EVIDENCE SEIZED BY THE STATE POLICE OFFICERS, WHILE IN VIOLATION OF THE LAWS OF THE UNITED STATES, SHOULD BE ADMISSIBLE IN COURT AGAINST THE DEFENDANT IS CLEARLY A CONSTITUTIONAL ISSUE, OF WHICH THIS COURT HAS REPEATEDLY TAKEN COGNIZANCE. THIS IS CLEARLY AN IMPORTANT CONSTITUTIONAL QUESTION WHICH HAS BEEN DECIDED BY THIS COURT BUT APPARENTLY NOT SETTLED AS THESE STATE COURT DECISIONS ARE NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT.

Although this Court has dealt with numerous cases involving the admissibility of illegally seized evidence including: illegal arrest, illegal wiretaps, illegal bugging, coerced confessions, and voluminous others, consistently holding that the materials illegally seized are inadmissible in a court of law, this illegal activity persists.

There are specific instances where a police officer makes a judgment mistake which violates the rights of an individual and that mistake has been held sufficient to justify exclusion of the evidence with part of the purpose behind that exclusion being an effort to prevent future violations.

It is respectfully submitted to this Court that no less an exclusionary policy should apply when there is a blatant, flagrant, and all-out total disregard for the written law which police officers are bound to uphold.

> "Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the

> Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000.00 or imprisoned not more than two years, or both." 18 U.S.C., §1385.

The above statute is not vague and it was designed to prevent military personnel from aiding in the enforcement of laws of the civilian sector. The above statute specifically prevents civilian police authorities from making use of any part of the Army or the Air Force to execute the laws of the State. This is prescribed illegal and unwarranted, and as the authorized penalty has not prevented gross and obvious violations of this law, an exclusionary policy would render the benefit of this illegal policy followed by the Lawton, Oklahoma Police Department and quite possibly many other law enforcement agencies across the United States of no import.

The legislative history behind 18 U.S.C., §1385, is set forth in 7 Congressional Records, 4241, 4245. "The Senate debate indicated a sense that the section was not limited by the expression 'as a posse comitatus other wise' but was to operate as if the prohibition ran—simpliciter—against the use of the Army to execute the laws, without reference to whether employed as a posse comitatus or as a portion of the Army." *Wrynn* v. *U. S.*, 200 F.Supp. 457, 465 (D.C.N.Y., 1961).

In *Gillars* v. *United States*, 182 F.2d 962, 972 (D.C.C.A., 1950), the Court of Appeals from the District of Columbia had earlier stated:

> "By using the words 'posse comitatus' the Congress intended to preclude the Army from assisting local law enforcement officers in carrying out their duties."

See also *Chandler* v. *United States,* 171 F.2d 921, 936 (1st Cir., 1948).

This Court has long recognized the rationale behind an exclusionary rule and why the existence of such is imperative. In *Mapp* v. *Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), this view was expressed by Mr. Justice Clark, writing for the majority:

> "But, as was said in Elkins, 'there is another consideration—the imperative of judicial integrity.' . . . the criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the Charter or its own existence."

Mapp recognized that illegally seized evidence must be made inadmissible in order to remove the incentive for police officers to obtain evidence by any illegal means as Mr. Justice Clark stated:

> "To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment. Only last year, the Court itself recognized the purpose of the exclusionary rule is 'to deter—to compel respect for the constitutional guarantee in the only effectively available way—by *removing the incentive to disregard it.*" [Emphasis added.]

It is logical that in order to deter state officials from open and obvious violations of a federal statute, the evidence obtained from said violations must be inadmissible. In *Elkins* v. *United States,* 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960), the Supreme Court disallowed evidence in a federal prosecution which had been obtained

illegally by a state officer. The Court, in *Mapp, supra,* noted this decision and said that a state court could not use in evidence that which could not be used in a federal prosecution. It said:

> "Thus, the State, by admitting evidence unlawfully seized, serves to encourage disobedience to the Federal Constitution which it is bound to uphold."

Similarly, state law enforcement officers are bound to uphold the laws of the United States of America; therefore, the state, by admitting evidence seized in violation of such law not only encourages disobedience to federal legislation but condones and excuses felonies committed by police officers. Therefore, the state court should not encourage conduct which is a felony under federal law by allowing evidence obtained by conduct constituting such a felony to be admitted in criminal prosecutions.

In this case, the Lawton authorities have clearly used the Army to execute the law in violation of 18 U.S.C. §1385. This Court should prevent the State from breaking or disregarding federal legislation and invoke the well considered rationale of Mr. Justice Brandeis in *Olmstead* v. *United States,* 277 U.S. 438, 72 L.Ed. 944, 48 S.Ct. 564 (1928), when he stated at 485:

> "Our Government is the potent, the omni present teacher, for good or for ill, it teaches the whole people by its example . . . If the Government becomes lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that the administration of the criminal law the end justified the means—to declare that the Government may commit crimes in order to secure the

> conviction of a private criminal—would bring terrible retribution."

It is respectfully submitted to this Court that an exclusionary rule is the only means whereby federal legislation, as here, can retain validity.

The state court decisions herein do not comply with nor do justice to past decisions of this Court. It is only necessary to look to past wiretapping decisions of this Court. If the government breaks the law by conducting illegal wiretappings, the evidence derived therefrom is not admissible in court. If the government breaks the law by using Army personnel to enforce local laws in violation of federal legislation, the evidence derived therefrom should be, and must be, inadmissible.

It was further stated in *Mapp* v. *Ohio, supra,* at 670, by Mr. Justice Douglas concurring:

> "As stated in the Weeks case, if evidence seized in violation of the Fourth Amendment can be used against an accused, 'his right to be secure against such searches and seizures is of no value, and . . . might as well be stricken from the Constitution.' "

A federal statute, such as we have here, is equally of no value and might as well be stricken from the books if its violation is encouraged by the courts. There can be no doubt that the United States Constitution provides for equal protection of the laws, and this Court, as stated above, adheres to that requirement.

United States Constitution, Amendment XIV:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens

of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

If the Criminal Courts of these United States deem it inappropriate or undesirable to follow the mandate of this Court, then this Court must resolve that conflict. These are particularly appropriate cases for this Court to grant review so that it may define or redefine, as the case may be, the reasons why illegally seized evidence will not be admissible in court.

II.

IN THE CASE AT BAR, THE QUESTION OF WHETHER THE SYSTEMATIC EXCLUSION OF A DEFINABLE CLASS OF PERSONS FROM A STATE DISTRICT COURT JURY PANEL IS IN DEROGATION OF THE UNITED STATES CONSTITUTION PRESENTS AN APPROPRIATE BASIS FOR THIS COURT TO GRANT CERTIORARI TO RESOLVE THAT QUESTION.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an *impartial jury* of the state and district wherein the crime shall have been committed, . . ." (Emphasis added.) United States Constitution, Amendment VI.

In the present case, the Defendant was tried in Comanche County, State of Oklahoma. Within the bounds of Comanche County lies Fort Sill Military Reservation, which has a population of 9,000 (Tr. 3). Since this is a military reservation, the land and the buildings on the land are exempt from ad valorem taxation. 68 O.S., §2405. Therefore, the 9,000 persons who live at Fort Sill who desire to

be on juries must affirmatively list their personal property on the tax rolls. Other persons living in Comanche County who own real property are automatically placed on the tax rolls. Here, an identifiable and sizable element of Comanche County is afforded different treatment with regard to its ability to be included on juries than other citizens of the County.

There is no intimation herein that qualification requirements established by the State of Oklahoma are unconstitutional.

> "All citizens of the United States, residing in this State, having the qualifications of electors of this State, who are a minimum of 21 years of age, of sound mind and discretion and of good moral character are competent jurors to serve on all grand and petit juries within their counties; . . ." Title 38, O.S., §24.

The fact that there is no discrimination in the qualification of jurors does not, in and of itself, mean there is no discrimination exercised in selecting potential jurors. Title 38, O.S., §18 provides in part:

> ". . . and select from the list of qualified jurors, as prescribed by this Chapter, of such county as shown by the tax lists in County Assessor's office for the concurrent year, all qualified jurors . . ."

The sum and total effect of the two aforementioned statutes points out one critical fact. The personnel stationed at Fort Sill Military Reservation are qualified jurors with possibly the exception of a few, the distinction being that such personnel will simply not be selected as jurors. These military personnel fit into two distinct and identifiable classes ac-

cording to the statutes of the State of Oklahoma: First they are military personnel, excluded by statute from the tax rolls of the State of Oklahoma, by the State of Oklahoma, and secondly, they are a specific and identifiable group not selected for jury duty by the State of Oklahoma.

In *Porter* v. *District Court of Oklahoma County*, 462 P.2d 340 (1970), it is stated:

> "It is petitioner's first proposition that any procedure which requires an accused tried by a jury which is composed solely of tax payers is not truly representative of the community and thus unconstitutional. Petitioners argue that those persons who are without means to own land and property may well feel that it is improper and prejudicial for them to be tried solely by the 'landed gentry.' In support of this proposition, Petitioners cite the case of *Rabinowitz* v. *United States*, 366 F.2d 34 (5th Cir., 1966) which held that: 'the federal statutes themselves were intended to insure that a fair cross-section of the community was placed on federal juries.' 366 F.2d at 58.
>
> "It is quite apparent, however, that the *Rabinowitz* case was limited to the selection of federal juries under 28 U.S.C.A., §§1861 to 1964, and is not applicable in consideration of the procedure for selection of juries for Oklahoma State Courts. Thus, *Rabinowitz* has considerably less than persuasive authority of this contention."

It is respectfully submitted to this Court that Federal Statutes themselves were intended to ensure that rights guaranteed by the United States Constitution would be protected.

The Court, in *Acuff* v. *State*, 283 P.2d 856 (1955), held:

> "[I]t is apparent that neither the constitutional nor statutory provisions require that to be eligible to sit as a juror a citizen must be a taxpayer. It is true that the legislature in its wisdom provided that qualified jurors be selected from tax rolls, but if citizens otherwise qualified, do not have their names on the tax rolls it seems obvious that it would be because of their own negligence or indifference they failed to list their property, however, meager. They, therefore, have only themselves to blame if their names do not appear on the tax rolls and on the jury rolls."

It may be true as above stated that the individuals have only themselves to blame, but a Defendant on trial has only the statutes of the State of Oklahoma to blame.

Since Fort Sill is a military reservation, the land and the buildings on the land are exempt from ad valorem taxation. 68 O.S., §2405.

RONALD A. LEE was a Sergeant in the United States Army, stationed at Fort Still, Oklahoma, when arrested on these charges. The personnel of Fort Sill Military Reservation, whether by design or inadvertence, are in a different class than the average citizenry in the State of Oklahoma. Therefore, if the accused shall have a right to be tried by a fair cross-section of the community, or by an impartial jury, of the county in which the crime shall have been committed, this Court must grant that right.

As stated in the case of *Porter, supra,* quoting from *Rabinowitz,* the federal statutes themselves were intended to ensure that a fair cross-section of the community was placed on federal juries. The obvious intent of requiring a

fair cross-section of the community is an effort to strive for the selection of an impartial jury.

If there is any segment of society that deserves all the rights and protections afforded by the United States Constitution, it is surely that segment which serves in the military of the United States as the military personnel are the ones protecting this Constitution along with its rights and privileges. As a fair and impartial jury is no less important than the right to counsel, this is an appropriate case for this Court to grant review so that military personnel throughout the United States will have no less constitutional guarantees than the average citizen.

CONCLUSION

For the reasons above stated, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

of Counsel:

JONES, WILLIAMS, BANE & KLINGENBERG

APPENDIX

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RONALD A. LEE,	)	
	)	
Appellant,	)	
	)	
V.	)	NO. A-18,091
	)	
THE STATE OF OKLAHOMA	)	
	)	
Appellee.	)	

ORDER OVERRULING PETITION FOR REHEARING AND DIRECTING ISSUANCE OF MANDATE

After full and careful consideration of the Petition for Rehearing and entire record in this case, this Court finds that said Petition should be, and it is hereby, overruled.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that Mandate issue herein FORTHWITH.

WITNESS OUR HANDS, and the Seal of this Court, this 22nd day of August, 1973.

s/ C. F. Bliss, Jr.

t/ C. F. BLISS, JR., PRESIDING JUDGE

t/ HEZ J. BUSSEY, JUDGE

ATTEST:
s/ Delmas Ford

CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RONALD A. LEE,	)	
	)	
Appellant,	)	
V.	)	NO. A-18,092
THE STATE OF OKLAHOMA	)	
	)	
Appellee.	)	

ORDER OVERRULING PETITION FOR REHEARING AND DIRECTING ISSUANCE OF MANDATE

After full and careful consideration of the Petition for Rehearing and entire record in this case, this Court finds that said Petition should be, and it is hereby, overruled.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that Mandate issue herein FORTHWITH.

WITNESS OUR HANDS, and the Seal of this Court, this 20th day of September, 1973.

s/ C. F. Bliss, Jr.

---

t/ C. F. BLISS, JR., PRESIDING JUDGE

s/ Hez J. Bussey

---

t/ HEZ J. BUSSEY, JUDGE

ATTEST:

s/ Delmas Ford

CLERK

IN THE COURT OF CRIMINAL APPEALS FOR
THE STATE OF OKLAHOMA

RONALD A. LEE,	)	
	)	
Defendant-Appellant,	)	
	)	
V.	)	NO. A-18,091
	)	
THE STATE OF OKLAHOMA	)	
	)	
Plaintiff-Appellee.	)	

—OPINION—

BLISS, Presiding Judge:

Appellant, Ronald A. Lee, hereinafter referred to as defendant, was charged, tried and convicted in the District Court of Comanche County, Case No. CRF-72-356, for the offense of Illegal Delivery of Marijuana. His punishment was fixed at seven (7) years imprisonment and a fine of four thousand dollars ($4,000) and from said judgment and sentence, a timely appeal has been perfected to this Court.

Because of the propositions asserted, we do not deem it necessary to recite a detailed statement of the facts. The State's evidence revealed that on May 5, 1972, at approximately 8:00 p.m., Larry Hugh Smith, Provost Marshal's Investigator for the CID Office, Fort Sill Military Reservation, met with Sergeant Ronald Rutledge of the Lawton Police Department and was given twenty-six dollars ($26) by Sergeant Rutledge in city funds and instructed to go to the defendant's trailer house and purchase some drugs. After receiving the twenty-six dollars ($26), Smith proceeded to the defendant's trailer house where he purchased a plastic baggie containing a green vegetable substance, paying the defendant twelve dollars ($12). Smith then returned with the substance and met Officer Rutledge where

the substance was placed into an evidence envelope and sealed. The Oklahoma State Bureau of Investigation determined that the vegetable substance was cannabis sitava (marijuana).

For the defense, the defendant and his wife both testified that they had not seen Smith at any time on the 5th day of May 1972, nor had Smith purchased any marijuana from the defendant on that day. The defendant presented two other witnesses who testified as to his good reputation in the community.

The defendant's first proposition asserts the trial court erred in overruling defendant's motion to suppress the testimony of military agent, Larry Smith. Defendant argues that the military CID Agent Smith's testimony was incompetent by virtue of a federal prohibition against him acting as a *posse comitatus*. Title 18 USC, Section 1385, provides:

> "Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both."

The question of the competency or incompetency of a military CID agent to testify because of the above statute has been answered by this Court in the case of *Hubert* v. *State*, Okl.Cr., 504 P.2d 1245 (1972) where this Court stated:

> "We further observe that neither statutory provision concerning competency of witnesses, 22 O.S., § 702, nor 12 O.S., § 385, provides that military personnel are incompetent as witnesses."

The record in the instant case reveals that agent Smith did not assume any greater authority than that of a private citizen in purchasing the marijuana in the instant case.

Agent Smith did not attempt to arrest the defendant, nor did he attempt to assert any military authority over the defendant. It is therefore our opinion that Agent Smith's testimony would not be incompetent by reason of Section 1385, supra. We therefore find no error in the trial court overruling defendant's motion to suppress.

The defendant's second and final proposition asserts that the trial court erred in overruling defendant's motion to quash the jury panel.

Under this proposition the defendant contends that he was not tried by an impartial jury of the county in which the crime he was charged with was committed, therefore, depriving him of equal protection of the law in violation of the Fourteenth Amendment to the United States Constitution. Defendant's argument is based on the contention that Fort Sill, Oklahoma, a military reservation, which is within Comanche County, has approximately nine thousand (9,000) residents who are not listed on the State ad valorem tax records and not eligible for jury duty unless they affirmatively list their personal property on the tax rolls. This question has previously been answered. In the case of *Walls* v. *State*, Okl.Cr., 485 P.2d 477 (1971), this Court stated in the Syllabus:

> "The Oklahoma statutes providing for listing qualified jurors in the county as shown by the tax lists of the County Assessor's office for the current year for service on court juries in the county, and that the names for said list shall come from the listing and assessments of real and personal property for taxation, are constitutional."

Also see the case of *Porter* v. *District Court of Oklahoma County*, Okl.Cr., 462 P.2d 338 (1969), and *Chandler* v. *State*, Okl.Cr., 501 P.2d 512 (1972).

Finding no error that would warrant modification or reversal, it is our opinion that the judgment and sentence

appealed from should be, and the same is hereby, AFFIRMED.

AN APPEAL FROM THE DISTRICT COURT OF COMANCHE COUNTY, OKLAHOMA, HONORABLE JACK BROCK, JUDGE,

RONALD A. LEE, appellant, was convicted in the District Court of Comanche County for the offense of Illegal Delivery of Marijuana, his punishment was fixed at seven (7) years imprisonment and a fine of four thousand dollars ($4,000), and he appeals. Judgment and sentence *AFFIRMED.*

OPINION BY BLISS, P. J.
BUSSEY, J., CONCURS
BRETT, J., DISSENTS

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

RONALD A. LEE,	)	
	)	
Defendant-Appellant,	)	
	)	
V.	)	NO. A-18092
	)	
THE STATE OF OKLAHOMA	)	
	)	
Plaintiff-Appellee.	)	

—OPINION—

BLISS, Presiding Judge:

Appellant, Ronald A. Lee, hereinafter referred to as defendant, was charged, tried and convicted in the District Court of Comanche County, Case No. CRF-72-328, for the offense of Unlawful Delivery of Marijuana. His punish-

ment was fixed at five (5) years imprisonment and from said judgment and sentence, a timely appeal has been perfected to this Court.

A brief statement of the facts are that on April 29, 1972, at approximately 9:00 p.m. Larry Hugh Smith, Provost Marshal Investigator for the CID's Office, Fort Sill Military Reservation, met with Detective Glen Williams of the Lawton Police Department and was given eighteen dollars ($18) by Detective Williams in city funds and instructed to go to the defendant's trailer and purchase some drugs. After receiving the eighteen dollars ($18), Smith proceeded to the defendant's trailer where he asked the defendant if he had any marijuana that he wanted to sell and the defendant replied "that he did and that he was selling it for $12 a lid." Smith then purchased one (1) "lid" of marijuana from the defendant, paying him twelve dollars ($12). Smith then returned with the "lid" to the south end of the trailer court where he met with Officer Williams, who placed the substance in an evidence envelope and sealed and initialed the envelope. The defendant stipulated that if the chemist for the Oklahoma State Bureau of Investigation were called as a witness, that he would testify that on the 1st day of May 1972 he received a package from the Lawton Police Department which contained a plastic baggie of green, leafy substance with the initials "L.H.S." and "G.W." on the plastic baggie; that he analyzed the substance and found it to be marijuana.

For the defense, the defendant's sister and the defendant's wife both testified that the facts as related by Smith in relation to the purchase of marijuana from the defendant on April 29, 1972, were untrue, as they were both at the defendant's house on this date.

The defendant cites two propositions for reversal: "The trial court erred in overruling defendant's motion to suppress the testimony of military agent Larry Smith" and

"The trial court erred in overruling defendant's motion to quash the jury panel."

As these two propositions are identical to the propositions asserted in the case of *Lee* v. *State*, Okl.Cr., ... P.2d ..... (A-18,091), we do not deem it necessary to rediscuss these propositions of error.

For the reasons set forth in *Smith*, supra, we are of the opinion that the judgment and sentence should be, and the same is hereby, AFFIRMED.

AN APPEAL FROM THE DISTRICT COURT OF
COMANCHE COUNTY, OKLAHOMA,
HONORABLE CARL DOLMAN, JUDGE,

RONALD A. LEE, appellant, was convicted for the offense of Unlawful Delivery of Marijuana, his punishment was fixed at five (5) years imprisonment, and he appeals. Judgment and sentence *AFFIRMED*.

OPINION BY BLISS, P. J.
BUSSEY, J., CONCURS
BRETT, J., DISSENTS

SUPREME COURT OF THE UNITED STATES
No. A-550, October Term, 19

RONALD A. LEE,

Petitioner,

v.

OKLAHOMA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including Dec. 20, 1973.

s/ Byron R. White

Associate Justice of the Supreme Court of the United States

Dated this 6th day of December, 1973

CERTIFICATE OF SERVICE

This is to certify that on this 20th day of December, 1973, a true and correct copy of the above and foregoing was delivered into the United States Mail addressed to the Hon. Larry Derryberry, Attorney General of the State of Oklahoma, State Capitol, Oklahoma City, Oklahoma, first class postage prepaid.

Stephen Jones

STEPHEN JONES

SUPREME COURT, U.S.
73 - 1041
FILED
JAN 30 1974
MICHAEL RODAK, JR., CLE

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. A-550

RONALD A. LEE,
Petitioner,

VERSUS

STATE OF OKLAHOMA,
Respondent.

BRIEF OPPOSING CERTIORARI

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January, 1974

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In the
Supreme Court of the United States
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RONALD A. LEE,
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STATE OF OKLAHOMA,
Respondent.

BRIEF OPPOSING CERTIORARI

STATEMENT OF THE CASE

Petitioner, Ronald A. Lee, was charged, tried and convicted in the District Court of Comanche County, State of Oklahoma, Case No. CRF-72-356, for the offense of Illegal Delivery of Marijuana. His punishment was assessed at seven (7) years imprisonment and a fine of Four Thousand Dollars ($4,000.00). Also, petitioner, Ronald A. Lee, was charged, tried and convicted in the District Court of Comanche County, State of Oklahoma, Case No. CRF-72-328, for the offense of Unlawful Delivery of Marijuana. Punishment was assessed at five (5) years imprisonment.

From said judgments and sentences, petitioner perfected appeals to the Oklahoma Court of Criminal Appeals, Cases No. A-18,091 and A-18,092, respectively. The Oklahoma Court of Criminal Appeals affirmed petitioner's con-

victions. Petitions for Rehearing were denied, therefore, rendering the State Court's determinations final.

The facts of the case set forth in petitioner's Petition for Writ of Certiorari will be accepted as true and correct with the following additions.

On May 5, 1972, petitioner lived at 650 Grand Avenue, Lawton, Oklahoma. At this time, petitioner was enlisted in the United States Army. Petitioner was stationed at Ft. Sill, Oklahoma.

Respondent further submits that neither the District Court of Comanche County nor the Oklahoma Court of Criminal Appeals made a finding that the concerted activity between the Lawton Police Department and Larry Hugh Smith, Provost Marshal Investigator for the C.I.D. Office, Ft. Sill Military Reservation, constituted a violation of the laws of the United States of America, to-wit: 18 U.S.C., §1385.

ARGUMENT AND AUTHORITIES

Petitioner seeks to void two State criminal convictions by challenging the composition of the jury and the admissibility of testimony offered by Larry Hugh Smith. Respondent respectfully submits that the Petition does not warrant review by this Court for the reasons stated below.

Petitioner contends that 38 O.S. 1971, §24 creates a system of jury selection which excludes a definable class of persons from a jury panel. Title 38 O.S. 1971, §24 provided that qualified jurors would be selected from the tax list of the County Assessor's office. The tax list contained names

of all persons who listed both real and personal property for purposes of taxation. Petitioner contends that there is a definable class of persons, numbering approximately nine thousand, who were excluded from the jury list due to this statute. Respondent respectfully submits that this Court has held that tax rolls may be used as a source for the jury list. The use of tax rolls in this manner does not violate the Fourteenth Amendment. See *Brown* v. *Allen*, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1953). See also *Roach* v. *Mauldin*, 391 F.2d 907 (5th Cir. 1968), *cert. denied* 393 U.S. 1095, 89 S.Ct. 884, 21 L.Ed.2d 786 (1969).

Therefore, respondent respectfully submits that this Court has previously denied certiorari or relief on the merits to other parties in substantially identical circumstances who were also challenging the use of tax rolls for formulating jury lists.

Petitioner's second issue questions the admissibility of testimony offered by a military agent who assisted civil law enforcement officers. Petitioner maintains that the military agent was acting as a posse comitatus, in violation of 18 U.S.C. §1385, and therefore, his testimony was inadmissible.

Respondent respectfully submits that this issue does not raise a federal question. Petitioner does not allege that he was the subject of any unlawful invasion of constitutional rights. Petitioner does not show that the evidence complained of operated to deprive him of the essentials of due process. Respondent further submits that 18 U.S.C. §1385 speaks only of the person who has violated this command and not of the person arrested thereby. Respondent

further submits that Larry Hugh Smith was an uncompensated informant and assumed no greater authority than that of a private citizen. Therefore, respondent respectfully submits that petitioner's contention does not allege deprivation of any guaranteed constitutional right. Thus, the Petition fails to raise a federal question.

It is respectfully submitted that the Oklahoma Court of Criminal Appeals, after considering the records of the State trial court, correctly interpreted the existing case law in finding that the petitioner was not denied any constitutional right. The court correctly found that the evidence regarding the purchase of marijuana was admissible. Furthermore, it is respectfully submitted that the Oklahoma Court of Criminal Appeals correctly held that the jury was properly constituted and impaneled.

CONCLUSION

THEREFORE, premises considered, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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January, 1974

CERTIFICATE OF SERVICE

This is to certify that I mailed a true copy of the foregoing instrument to which this certificate is attached, to the following named counsel of record this ..... day of January, 1974:

MR. STEPHEN JONES
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Counsel for Petitioner.

.....
Marvin C. Emerson